SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM 1943

No._____

EARL MOORE, Appellant below, and
W. E. EDWARDS and D. L. LACEY, his sureties on appeal, Petitioners

v.

ILLINOIS CENTRAL RAILROAD COMPANY,
Appellee below and Respondent

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

OPINIONS OF COURTS BELOW.

The opinion and judgment of the trial court appears at Record 49-50. The opinion of the Circuit Court of Appeals, reported in 136 Fed. (2d) 412, appears at Record 59-62.

II.

JURISDICTION.

1. The date of the judgment of the Circuit Court of Appeals to be reviewed is June 17, 1943. (R. 63).

2. The statutory provision which is believed to sustain the jurisdiction of this court is U. S. C. A., Title 28, Section 347(a) and Rule 38, Paragraph 5(b), of this court.

3. The petitioner's wages under the contract in suit were payable on the 15th and 30th days of each month for the preceding two weeks' period and were not payable in advance (R. 48). The respondent wrongfully discharged petitioner in violation of its contract with petitioner's labor union. While petitioner in the former action sued for $12,000.00, he sought as the proper measure of his damage the amount he would have earned under the terms of said contract with the respondent. (R. 31). No future damages were sought by that action. The petitioner was entitled by said action to recover only the wages which he would have earned to the date on which said action was filed in September, 1936. An amount less than such amount was actually awarded petitioner. Under the applicable decisions of the Supreme Court of Mississippi, the petitioner is entitled to maintain this action for his wages accrued and matured since the filing of the former

action and which were not included or recovered therein.

The question presented is important not alone because of the fact that the applicable and controlling state decisions were not followed and applied by the lower courts, but this contract under which petitioner was employed governs the rights of thousands of union employees of the entire Illinois Central system extending from one end of the State of Mississippi to the other and then across the entire state. The judgments of the lower courts are in irreconcilable conflict with the controlling decisions of the highest court of Mississippi on such question. One rule of res judicata in the Federal Court and a different rule in the State Court under such circumstances should not be allowed to stand. Under the rule in Mississippi, a series of suits may be brought for wages as they mature under a contract of employment without impinging upon the rule of res judicata. Where the contract of employment is for no definite or fixed period of time, the rule is that such suit must of necessity for obvious legal reasons be brought only for the wages which have previously accrued or matured. The jurisdiction of the trial court was founded on diversity of citizenship. (R. 1-2). The question presented is therefore controlled by the law of Mississippi where the contract

of employment was entered into and performed. The District Court and the Circuit Court of Appeals erroneously held that the judgment in the former suit was a bar to this action. (R. 49-50, 63). Such decision is in irreconcilable conflict with the decisions of the Supreme Court of Mississippi on the point.

4. The cases believed to sustain said jurisdiction are as follows:

Erie Railroad Co. v. Thompkins, 304 U. S. 64.

New York Life Insurance Co. v. Jackson, et al, 304 U. S. 261.

Ruhlin v. New York Life Insurance Co., 304 U. S. 202.

Vandenbark v. Owens Illinois Glass Co., 311 U. S. 538.

Moore v. Illinois Central Railroad Co., 312 U. S. 630.

III.

STATEMENT OF THE CASE.

This has already been stated in the preceding petition at pages 3 to 6 which is hereby adopted and made a part of this brief.

IV.

SPECIFICATION OF ERROR.

The Circuit Court erred in affirming the judgment of the District Court thereby holding that the judgment in the former case of Earl Moore v. Illinois Central Railroad Company, filed in September, 1936, is a bar to this suit for the recovery of wages accrued to him since the filing of said former action and not included therein.

V.

ARGUMENT.

The lower court in its opinion recognized in part the rule in Mississippi to be as contended by petitioners, viz:

> "(1) He may bring separate, successive suits after the due date of each salary payment for damages due and unpaid on the date the suit is filed, in which event recovery under the first suit does not prevent actions for damages subsequently accruing;" or (2) he may bring one suit for all damages, accrued and to accrue in the future, growing out of the breach." (R.60).

The court, however, held that petitioner had brought his first suit for all damages, both past and future, and that the recovery in the former action was a bar to this suit. It is significant in such con-

nection that the lower court was unable to cite any authority from Mississippi to sustain such announcement but relied upon **Pierce v. East Tenn. C. & I. R. Co.,** 173 U. S. 1; **McCargo v. Jergens,** 99 N. E. (NY) 838; **Cutter v. Gillette,** 163 Mass. 95; Sutherland on Damages, 4th Ed., Vol. III, Sec. 692; McCormick on Damages, Sec. 158.

An analysis of the proceedings in the former suit may be helpful here. The ad damnum clause of the declaration in the former suit (R. 31) fairly characterizes the nature thereof, viz:

> "That under and by virtue of the provisions of said contract, the minimum pay per day was $6.64 and if said plaintiff had not been discharged the said plaintiff would have worked a sufficient number of days as Number 52 on the original roster of November 13th, 1926, as amended by succeeding rosters, so that plaintiff would have earned the sum of $12,000.00, but because of the breach of said contract of employment and the arbitrary discharge of said plaintiff by defendants, as aforesaid, said plaintiff has earned nothing."

The lower court in its opinion (R. 61) said:

> "The declaration did not allege that Moore would have earned $12,000.00 within the period from February 15, 1933 to September 16, 1936."

With deference, the lower court was mistaken

in such statement because the declaration states just that—that the plaintiff **would have earned $12,000.00** but for his discharge. True enough, plaintiff could not and did not show that he would have worked during the period involved in the former suit enough to earn $12,000.00, consequently he was awarded the smaller amount. There is nothing in the declaration in the former suit to indicate that the plaintiff therein sought future damages. The lower court thought it significant enough to mention in its opinion that petitioner in the former suit was dissatisfied with the award of $4,183.20 and filed a motion to set aside that judgment assigning as one ground: "That no future damage was awarded." (R. 41). The trial court, however, correctly overruled that motion (R. 42) and thereby corrected such false impression of the plaintiff. The form of the action in either case certainly can have no controlling effect on the substantive right of the injured party to recover his subsequent damages. The measure of the petitioner's damages in either case was the amount he would have earned in the employ of respondent, less what he was able to earn in the employ of another. The wages on this contract of employment were payable on the 15th and 30th days of each month for the preceding two weeks' period of work. (R. 48). The plaintiff never renounced the contract and never elected to sue for all damages. Since his discharge "He has all time since said time offered his services to defendant under the terms of said contract, but the defendant has all since steadfastly declined to allow him to resume such employment." (R. 49).

There is simply nothing in the record to show that petitioner elected to recover all of his damages for breach of this contract in the former action. The lower court said that the litigants and court, however, treated the former suit as one for the recovery of all damages, past, present and future. With deference, the pleadings in that case do not justify such conclusion. That question was not presented as an issue to the court in the former case and any such statement to such effect was of necessity mere dictum. Naturally counsel sought to recover everything possible for his client on the first declaration and nothing in the argument or brief can change the nature of the case as contained in the first declaration.

In **Mississippi Power & Light Co. v. Pitts,** 179 So. 363, 181 Miss. 344, the Supreme Court of Mississippi, said:

> "The doctrine of estoppel is not available, because that doctrine has reference to factual matters, and not to contentions upon the law as applied to a given state of facts. There can be no estoppel where both parties were equally in possession of all the facts pertaining to the matter relied on as an estoppel, and the position taken in respect thereto involved solely a question of law. 21 C. J. p. 1231." * * * * "Arguments in the alternative upon a given state of facts are permissible and are heard every day in all our courts, and, in the interest of the law,

> rightly so. And the courts decide according to any of the alternatives they think tenable, or may decide according to a view of the law not argued at all, or even upon a point or points which counsel for both sides contend has nothing to do with the case."

Indeed, if it can be said that petitioner elected any course in this matter, it is submitted that this record shows that the petitioner has elected to treat himself as an employee of the company since the date of discharge. (R. 15, 16; 48-49). The respondent might have availed itself of his proffer of services at any time with effect. 12 Am. Jur., Section 390, pp.968-969; 13 C. J., Section 729, p. 655; Kentucky Natural Gas Corporation v. Indiana Gas & Chemical Corp., 7 CCA., 143 A. L. R. 484, cert. denied 63 S. Ct. 161.

The first declaration did not seek future damages and could not have sought a recovery of wages before they became due for obvious legal reasons. First, it could not be known how long the employee would be out of employment and how much he would earn elsewhere during his unemployment. Second, it could not be known when, if ever, this contract would be terminated according to its terms and there would be no manner of calculating damages without knowing the period of unemployment. The petitioner in the first suit was only entitled to recover the wages "due and unpaid on the date the suit is filed" as the lower court correctly stated in its opinion

in this case. (R. 60). Cf. **Gulf & C. Ry. Co. v. Hartley**, 41 So. 382, 88 Miss. 674. The court in the latter case said that a recovery could not be had of damages which occurred or accrued after the filing of the declaration. True, the petitioner in this case was awarded all damage in the first suit that the trial court thought he would have earned to November, 1936. (R. 36). While the declaration did not authorize such award, it is not contended that we are entitled to any wages on this contract prior to November, 1936.

The contract in suit was before the Supreme Court of Mississippi in the course of the first litigation between the parties as reported in 176 So. 593, 180 Miss. 276, where the Supreme Court said that the provisions of this contract "are practically identical with the one under consideration in **Moore v. Y. & M. V. R. R. Co.**, 176 Miss. 65, 166 So. 395, and **McGlohn v. Gulf & S. I. R. R.**, 179 Miss. 396, 174 So. 250."

In the latter case the court said:

> "We are of the opinion that the contract of the union was not void, **for the reason that it is terminable at the will of either party.** True it is that the employee was not bound to a state of servitude for life, and that the particular conductor here could have left the service if and when he pleased so to do. **The contract, fairly interpreted, is that the railroad company agreed**

> **with these employees that the length of service of the particular employee, so far as the railroad was concerned, would be until a trial—completely under the control of the employer**—should be had in accordance with article 30 and might be terminated in the manner therein provided; in other words, while the railroad company, generally, may have the right to terminate the contract at its will, **a solemn stipulation was made by it by which it is bound not to exercise such will in a summary manner, but in a certain well-defined manner and by a stipulated course of procedure. We conclude that this section was a material, substantial part of this contract by which appellant was induced to enter into and continue in this employment, and a part of the promised consideration therefor."**

Here we have a continuing divisible contract on which the petitioner has recovered damages for its breach to November, 1936. This suit is for a recovery of wages that he would have earned, less wages he has earned since that time to June, 1942, when the present suit was instituted. At all times since his discharge which this court has said was wrongful and without justification, the petitioner has continued to proffer his services and insist upon his right to work for the respondent as a member of this union. At any time during such period, the respondent may have availed itself of such proffer or it may have found cause to properly discharge

the petitioner according to its contract (R. 13) but has not done so.

Under such circumstances, the petitioner is entitled to bring a succession of suits for wages as they mature and would have been earned under this contract until it is terminated or cancelled according to its terms.

The rule of res judicata is a wholesome one in its proper office. The courts, however, are reluctant to extend its application and will never do so in a doubtful case.

In **Kelliher et al v. Stone & Webster,** 75 F. (2d) 331, it is said:

> " 'While the enforcement of the rule of res judicata is essential to secure the peace and repose of society, it is equally true that to enforce the rule upon unsubstantial grounds would work injustice.' City of Vicksburg v. Henson, 231 U. S. 259, 34 S. Ct. 95, 58 L. Ed. 209. 'According to Coke, an estoppel must "be certain to every intent"; and if upon the face of a record anything is left to conjecture as to what was necessarily involved and decided, there is no estoppel in it when pleaded, and nothing conclusive in it when offered as evidence.' Russell v. Place, 94 U. S. 606, 610, 24 L. Ed. 214."

The lower court, however, has extended the rule of res judicata beyond any limits recognized in Mis-

sissippi jurisprudence. While the lower court properly recognized the true rule contended for in this case, it failed to apply such rule in its decision thereof.

In **Cantrell v. Lusk,** 113 Miss. 137, 73 So. 885, the court said that a recovery of damages from a railroad for negligent construction and maintenance of its right of way for damages to one crop does not preclude a subsequent recovery for damages occasioned by the same condition to another crop.

In **Eminent Household of Columbian Woodmen v. Bunch,** 115 Miss. 512, 76 So. 540, in the syllabus it is said:

> "An action for permanent total disability, in which it was determined that he was not totally disabled, and was acting as a justice of the peace, was not a bar to a later action for disability at a later date when he was not acting as a justice, and the infirmities were the same, except that they had grown worse."

In **Commercial Credit Co. v. Newman,** 189 Miss. 477, 198 So. 303, the finance company sued out a writ of replevin for a Plymouth automobile when only some of its installments were delinquent and lost the case. After all of the installments on the contract matured, another replevin was instituted and the former suit was pleaded as res judicata. The court said that the plea was good only as to the notes

which were due and payable when the first action was instituted.

In **Williams v. Luckett,** 77 Miss. 394, 26 So. 967, Luckett sued Williams on a contract of employment and recovered judgment for $190.15 on a contract of employment commencing September 1, 1898, and ending September 1, 1899, at a salary of $50 per month payable monthly. The defendant discharged the plaintiff on January 2, 1899, without cause and he did no work thereafter. In February, 1899, he commenced suit and recovered $190.15 for his wages for the month ending January 31, 1899, and the judgment was satisfied. The present suit was for the balance of his wages due up to August, 1899. From February 1, 1899, plaintiff had earned $109.45 and had made diligent effort to obtain other employment and had failed. The lower court held that the former suit was res judicata in the second suit as to the terms of the contract and that it was a hiring by the month and not by the year. The defendant moved the court to direct a verdict for it on the ground that there had been a recovery for the breach of the identical contract sued on, and that plaintiff was barred of another recovery. This motion was overruled. The court said:

> "The ruling of the circuit court is sustained by the cases of Armfield v. Nash, 31 Miss. 361, and Davis v. Hart, 66 Miss. 642, 6 So. 318. It is insisted, however, that Armfield v. Nash is unsound, and that it is particularly overthrown

by Olmstead v. Bach, (Md.) 27 Atl. 501, 22 L. R. A. 74. That generally a contract is a single thing, and a breach of it affords but one cause of action, is often stated; but where the parties have made the contract divisible, or have made the payments due under it payable by installments at several periods during its execution, then the authority to bring several suits follows as a legal consequence. If Williams had not discharged Luckett, but had failed to pay him as the monthly wages became due, it is clear that Luckett would have had a right of action accruing to him at the expiration of each month of service, and might have sustained as many suits as there were defaults of payment. The bringing of the first suit for the January wages did not end the contr .ct, nor amount to a rescission of it on the part of Luckett. The contract, notwithstanding the suit for damages for the nonpayment for the monthly sum of wages, remained in full force; and Williams might thereafter have received him back into his employ, or continued to subject himself to other suits for the continued breach of it. The contract, by its terms, is equivalent to the making of as many contracts as there are periods of payment, or at least the sums to be paid are divisible by its express terms; and the terms of the contract is the law of the contract. Armfield v. Nash is supported by Wilkinson v. Black, 80 Ala. 329; Isaacs v. Davies, 68 Ga. 162; 14 Am. & Eng. Enc. Law 798, and authorities cited. We

see no sufficient reason for departing from Armfield v. Nash, and affirm the doctrine of it, as comporting with right and justice. Ramsay v. Brown (Miss.) 25 So. 151.

"Affirmed."

The procedure adopted by the petitioner in this case has long been approved in the jurisprudence of Mississippi. The rule announced by the court in Williams v. Luckett, supra, applies with special force to a case where as here, the contract is not for a definite term. The rule in that case clearly demonstrates the propriety of this second action on the same contract for the wages which matured after the filing of the first suit.

The petitioner's contention is forcefully announced by the court in Thorne v. True-Hixon Lumber Co., 167 Miss. 266, 148 So. 388, where Thorne sued the company on a contract of employment dated May 4, 1929, for wages at $4.50 per day straight except Sundays and furnish of a residence of the rental value of $20. Thorne was discharged without cause on January 15, 1931. He recovered one month's wages in the amount of $117.00 and this judgment was satisfied. Thereafter on February 13, 1932, Thorne filed his declaration in the same language against the company to recover his wages and the rental value of the residence for the period intervening between the filing of the first suit and the filing of the second. The company filed a plea of res judicata which was sustained by the trial court.

The Supreme Court in reversing the lower court said:

> "A contract is generally single, and a breach of it affords but one cause of action, but this court is aligned with those jurisdictions which hold that where wages are to be paid in installments during the execution of the contract, several suits may be maintained for accrued wages. Armfield v. Nash, 31 Miss. 361; Williams v. Luckett, 77 Miss. 394, 26 So. 967, 968. In the latter case, Williams had discharged Luckett, allegedly without cause, and Luckett sued for and recovered the wages for January, 1899. Thereafter he sued for wages accruing from February 1 to August 1, 1899, and in passing upon his right to recover in the second suit, the court said: 'If Williams had not discharged Luckett, but had failed to pay him as the monthly wages became due it is clear that Luckett would have had a right of action accruing to him at the expiration of each month of service, and might have sustained as many suits as there were defaults of payment. The bringing of the first suit for the January wages did not end the contract, nor amount to a rescission of it on the part of Luckett. **The contract, notwithstanding the suit for damages for the nonpayment for the monthly sum of wages, remained in full force; and Williams might thereafter have received him back into his employ, or continued to subject himself to other suits for the**

continued breach of it. The contract, by its terms, is equivalent to the making of as many contracts as there are periods of payment, or at least the sums to be paid are divisible by its express terms; and the terms of the contract are the law of the contract.'

"This doctrine is applicable with particular force where, as here, the contract is not for a definite or fixed term, but the termination thereof is dependent upon contingencies which render it impossible to, at the time, definitely determine when it will expire."

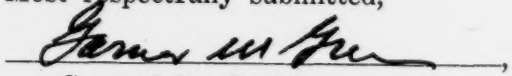
It is submitted with deference that no binding election can be read into the first suit so as to make it an action for future as well as past damages. The petitioner mistakenly sued for more than he could have earned but the gravamen of his action was the damage at $6.64 a day which he was denied the right to earn. He mistakenly averred that he would have earned $12,000.00. He could not have earned that much to the date of the filing of his first declaration and on that date he could not know and did not know just how long the respondent would continue to breach its contract. As each payday passed, the petitioner was entitled to institute a separate suit without being successfully met with a plea of res judicata. Likewise he was entitled to allow his wages to accumulate until such time as they would not be barred by the statute of limitations before suing therefor. Under the rule in Mississippi, the peti-

tioner has not elected to pursue any course inconsistent with or different from the rule entitling a succession of actions in such cases.

CONCLUSION.

It is therefore respectfully submitted that this case is one calling for the exercise by this court of its supervisory powers by granting a writ of certiorari and thereafter reviewing and reversing said decision of the Circuit Court.

Most respectfully submitted,



Counsel for Petitioners,
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NOTE

Moore's first declaration filed under conformity statute. All forms of action in Mississippi abolished by statute. Relief is granted on concise statement of case. Section 521, Mississippi Code 1930, provides:

"* * *and it shall not be an objection to maintaining any action that the form thereof should have been different."